S. HRG. 99-999

CHILD SEXUAL ABUSE AND PORNOGRAPHY ACT OF 1986

HEARING

BEFORE THE

SUBCOMMITTEE ON JUVENILE JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

S. 2398

A BILL TO AMEND TITLE 18 OF THE UNITED STATES CODE TO BAN THE PRODUCTION AND USE OF ADVERTISEMENTS FOR CHILD PORNOGRAPHY OR SOLICITATIONS FOR CHILD PORNOGRAPHY, AND FOR OTHER PURPOSES

AUGUST 11, 1986

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THE CHILD SEXUAL ABUSE AND PORNOGRAPHY ACT OF 1986—S. 2398

MONDAY, AUGUST 11, 1986

U.S. SENATE,
SUBCOMMITTEE ON JUVENILE JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room SD-226, Dirksen Senate Office Building, Hon. William V. Roth, presiding.

Present: Senator Simon.

Staff present: Tracy McGee, chief clerk, and Laurie Westley, minority chief counsel, from the Subcommittee on Juvenile Justice; Rick Holcomb, general counsel from the Subcommittee on Security and Terrorism; Daniel F. Rinzel, chief counsel and staff director; Barbara Kammerman, deputy chief counsel; Carla Martin, acting chief clerk; Sallie Cribbs, executive assistant to chief counsel; and Fred McCaffrey, press secretary, from the Permanent Subcommittee on Investigations.

OPENING STATEMENT OF HON. WILLIAM V. ROTH, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator ROTH. The subcommittee will please be in order. I regret very much that Chairman Specter could not be here today, as I know of his great interest in one of the most urgent problems facing our Nation, and that is the question of sexual abuse of children.

I also have a statement by Senator Denton who would have liked to have been here, but could not because of commitments back home. I would ask that it be incorporated as if read.

[The statement follows:]

PREPARED STATEMENT OF HON. JEREMIAH DENTON, A U.S. SENATOR FROM THE STATE OF ALABAMA

Mr. Chairman, I commend you for your leadership in the fight against pornography. Particularly, I commend you for introducing S. 2398, the Child Sexual Abuse and Pornography Act, a bill which I was only too pleased to join as an original cosponsor. I also commend Chairman Specter for scheduling today's hearing on this important piece of legislation.

Mr. Chairman, pornography attacks human dignity itself at its very core. It is an epidemic that devastates the personal and social well-being of contemporary society. We must remain alert to its effects and take countermeasures to prevent its spread. Pornography encourages the sexual exploitation and abuse of men, women and children, with tragic consequences.

Testimony received in this Subcommittee indicated beyond a doubt that the effects of pronography are devastating, both to the individual and to society. The sex

industry abuses and exploits not only those who engage in making pornography, and those who are exposed to it, but also those who are victimized by its effects on other people. It uses every means of social communication: books, magazines, tabloids, films, video cassettes, subscription television, video games, coin-operated machines, computers and erotic telephone messages.

Pornography is an offense against the rights of all people. It is a problem which victimizes everyone. In order to deal effectively with the problem we must recognize that pornography victimizes all members of society, regardless of sex, age, race, religion, or social station. Pornography is particularly egregious when children become unwilling participants or when children are sexually abused or exploited as a result of the pornography.

Mr. Chairman, hearings conducted by this Subcommittee, the Subcommittee on Criminal Law and the Subcommittee on Security and Terrorism, which I chair, have demonstrated beyond doubt that there is a direct link between child pornography and the sexual abuse and exploitation of our nation's children. In fact, at the Subcommittee on Security and Terrorism hearing, testimony was presented by the FBI that pedophiles make extensive use of child pornography to stimulate and justify their behavior, to lower the child's inhibitions and reluctance, to blackmail the child victim and to establish a medium by which they can communicate with other like-minded criminals.

Mr. Chairman, the Congress must work to eliminate the production of child pornography and the sexual exploitation and abuse of our children. It is only through hard work and cooperation that, we can find a way to solve the problem of child sexual exploitation which, because of past errors, has been allowed to flourish unabated. The production of child pornography degrades and exploits children in a fundamental, inhumane, uncivilized way, and harms all of society in the process.

Mr. Chairman, S. 2398, the Child Sexual Abuse and Pornography Act of 1986, provides a necessary tool in our fight against child pornography. The bill creates a criminal penalty for advertising or soliciting child pornography and child sexual abuse, revises the Mann Act so that it will apply to males as well as females and outlaws the "trading" of young children by pedophiles across state lines, regardless of whether the activity is done for "commerical" purposes.

Mr. Chairman, I commend you for your efforts and I urge my colleagues to report this important piece of legislation to the full Committee as quickly as possible.

Thank you, Mr. Chairman.

Senator ROTH. The question of sexual abuse of children is a problem that has occupied this subcommittee as well as my Permanent Subcommittee on Investigation for the past several years. Unfortunately, it is not a new problem. Child abuse has been with us a long time. It is a subject which has come more to the public attention thanks to the interest of the media in the matter, as well as law enforcement officials and victims themselves who have begun to step forward.

Now, a number of important steps have been taken in recent years to strengthen the law. Back, I think it was in 1978, I made certain proposals which were adopted. These were built upon a few years ago. I am not going to outline all of them here.

As a result of the Child Protection Act of 1984, a number of prosecutions enforcements have since taken place, and while this is all encouraging, I believe much more can be done. I mentioned that PSI held a series of hearings in 1984 and 1985 exploring the international distribution of child pornography and the links between child pornography and the activities of pedophiles—that is, emotionally disturbed individuals who are sexually attracted to preadolescent children.

Our investigation revealed beyond any doubt that a link does exist, and it also exposed that there were several loopholes in existing laws against child pornography and child sexual exploitation including the fact that while child pornography itself is illegal, there is no prohibition against its promotion or advertisement.

In my opinion, it makes no sense, no sense whatsoever, to outlaw the production, the sale, the possession of child pornography, and then turn around and permit this illegal, harmful material to be publicly advertised. It is a little bit like outlawing gambling and then showing the lottery results on TV.

So to close this loophole, 12 other Senators and myself introduced on May 1 of this year the legislation which this subcommittee is considering today. S. 2398, the Child Sexual Abuse and Pornography Act, is intended to further restrict the access of pedophiles and other child molesters to child pornography.

Testimony before PSI showed that pedophiles make extensive use of child pornography to stimulate, to justify their ugly behavior, to entice and to blackmail the innocent children who become their victims.

Many pedophiles are members of a large informal underground network through which they exchange child pornography and information about potential victims. Sometimes the exchange of information is carried out through ads and newsletters published by a number of pedophile support groups.

S. 2398 would help to end this practice by prohibiting any advertisement offering child pornography as well as any advertisements soliciting sexually explicit conduct with a minor. The bill provides for a term of 10 years for the first offense, 15 years for a second. I believe this legislation will provide an important tool for our law enforcement authorities to clamp down on those who would sexually abuse innocent children.

The bill further tightens our child abuse laws by eliminating all references to gender in the statute prohibiting the interstate transportation of minors for prohibited sexual conduct, popularly known as the Mann Act. Our investigation showed that many pedophiles abuse young boys as well as young girls, and that they sometimes trade their young victims across State lines without actually selling their services in the traditional sense of that word.

S. 2398 would make the Mann Act applicable to such activities regardless of the sex of the minor involved, and regardless of whether the transportation of the minor was "commercially exploited."

We must not forget that every piece of child pornography depicts a terrible crime, the sexual abuse of a child. These children are robbed of one of life's most precious gifts, childhood innocence. Once that gift is taken away, it can never be restored.

As I said before, there is simply no question about the link between child pornography and the sexual abuse of children. Where you find child pornography, you will probably find an actual or a potential child molester. Law enforcement must organize and arm itself to follow up on any and all leads that could help identify child abusers. We, in Congress must do all we can to ensure that the laws are free of any loopholes that might permit child pornographers and child abusers to escape prosecution for their unconscionable crimes. It is the least we can do for our children. I hope that this subcommittee will see fit to expedite consideration of S. 2398 so that the Senate can quickly close these loopholes in our laws against child abuse.

[Text of S. 2398 follows:]

II

99TH CONGRESS
2D SESSION

S. 2398

To amend title 18 of the United States Code to ban the production and use of advertisements for child pornography or solicitations for child pornography, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 1 (legislative day, APRIL 28), 1986

Mr. ROTH (for himself, Mr. DENTON, Mr. NUNN, Mr. EXON, Mr. BUMPERS, Mr. TRIBLE, Mr. MATTINGLY, Mrs. KASSEBAUM, Mr. GRASSLEY, Mr. BOREN, Mr. DECONCINI, Mr. GRAMM, Mr. CHILES, and Mr. NICKLES) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend title 18 of the United States Code to ban the production and use of advertisements for child pornography or solicitations for child pornography, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Child Sexual Abuse and Pornography Act of 1986".

SEXUAL EXPLOITATION OF CHILDREN

SEC. 2. (a) Section 2251 of title 18, United States Code, is amended—

(1) in subsection (a) by striking out "subsection (c)" and inserting in lieu thereof "subsection (d)";

(2) in subsection (b) by striking out "subsection (c)" and inserting in lieu thereof "subsection (d)";

(3) by inserting after subsection (b) the following new subsection:

"(c) Any person who makes, prints, or publishes, or causes to be made, printed, or published, any notice, statement, or advertisement—

"(1) to receive, exchange, trade, buy, produce, display, disseminate, photograph, film, print, or record, any visual depiction involving the use of a minor engaging in sexually explicit conduct; or

"(2) offering participation in any act of sexually explicit conduct with any minor,

if such person knows or has reason to know that such notice, statement, or advertisement—

"(A) is for material which in fact depicts sexually explicit conduct as provided in clause (1) or offers participation in any act of sexually explicit conduct as provided in clause (2); and

"(B) will be transported in interstate or foreign commerce or mailed, or if such notice, statement, or advertisement has actually been transported in interstate or foreign commerce or mailed,

shall be punished as provided under subsection (d)."; and

(4) by redesignating subsection (c) as subsection (d).

(b) Paragraph (2) of section 2255 of title 18, United States Code, is amended—

(1) in clause (D) by striking out "abuse" and inserting in lieu thereof the following: "abuse (for purposes of sexual stimulation of any person)"; and

(2) in clause (E) by striking out "lascivious" and inserting in lieu thereof "lewd or lascivious".

TRANSPORTATION OF INDIVIDUALS FOR IMMORAL PURPOSES

SEC. 3. Section 2421 of title 18, United States Code, is amended by—

(1) striking out "woman or girl" each place it appears and inserting in lieu thereof "individual";

(2) striking out "give herself up to" each place it appears and inserting in lieu thereof "engage in";

(3) striking out "her" and inserting in lieu thereof "the individual"; and

(4) striking out "on the part of such person".

COERCION OR ENTICEMENT OF AN INDIVIDUAL

SEC. 4. (a) Section 2422 of title 18, United States Code, is amended by—

(1) striking out "of female" in the heading of such section;

(2) striking out "woman or girl" each place it appears and inserting in lieu thereof "individual";

(3) striking out "on the part of such person"; and

(4) striking out "without her consent" and inserting in lieu thereof "without the consent of such individual".

(b) The title for section 2422 in the table of sections of chapter 117 of title 18, United States Code, is amended to read as follows:

"2422. Coercion or enticement.".

COERCION OR ENTICEMENT OF A MINOR

SEC. 5. Section 2423 of title 18, United States Code, is amended—

(1) in clause (2) of subsection (a) by inserting before "commercially exploited" the following: "recorded and distributed, or"; and

(2) in subsection (b)—

(A) in paragraph (2) by striking out clauses (D) and (E) and inserting in lieu thereof the following:

"(D) sadistic or masochistic abuse (for purposes of sexual stimulation of any person); or

"(E) lewd or lascivious exhibition of the genitals or pubic area of any person;"; and

(B) in paragraph (3) by striking out "commercial exploitation" and inserting in lieu thereof "commercially exploited";

(C) in paragraph (3) by striking out the period at the end thereof and inserting in lieu thereof "; and"; and

(D) by adding at the end thereof the following:

"(4) the term 'recorded and distributed' refers to activities—

"(A) involving the exchange, trade, receipt, offer, display, or dissemination of photographs, films, prints, or audio or video recording of the prohibited sexual conduct; and

"(B) that need not have monetary or other material gain as a direct or indirect goal.".

FILING FACTUAL STATEMENT ABOUT ALIEN

SEC. 6. (a) Section 2424 of title 18, United States Code, is amended—

(1) in the heading of such section by striking out "female";

(2) by striking out "woman or girl" each place it appears;

(3) by striking out "her" each place it appears and inserting in lieu thereof "the alien's";

(4) by striking out "she" each place it appears and inserting in lieu thereof "the alien";

(5) by striking out "his" and inserting in lieu thereof "his or her"; and

(6) in subsection (b) by striking out "him" each place it appears and inserting in lieu thereof "the person".

(b) The title for section 2424 in the table of sections for chapter 117 of title 18, United States Code, is amended to read as follows:

"2424. Filing factual statement about alien.".

AMENDMENT TO THE HEADING OF CHAPTER 117

SEC. 7. (a) The table of sections for chapter 117 of title 18, United States Code, is amended by striking out the caption for the chapter and inserting in lieu thereof the following:

"CHAPTER 117. PROSTITUTION AND RELATED OFFENSES".

(b) The table of chapters for part I of title 18, United States Code, is amended by striking out the item for chapter 117 and inserting in lieu thereof the following:

"117. Prostitution And Related Offenses ..... 2421.".

Senator ROTH. Now our first witness today is Mr. Lawrence Lippe who is Chief of the General Litigation and Legal Advice Section of the Criminal Division of the U.S. Department of Justice. Mr. Lippe, would you please come forward. If S. 2398 is enacted into law, the Department of Justice will, of course, be responsible for enforcing it. For that reason, I welcome the views of the Department.

Please proceed, Mr. Lippe.

STATEMENT OF LAWRENCE LIPPE, CHIEF, GENERAL LITIGATION AND LEGAL ADVICE SECTION, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. LIPPE. Mr. Chairman, I am indeed pleased to appear before the committee today to discuss S. 2398, the Child Sexual Abuse and Pornography Act of 1986. I have a prepared statement which I would request be made part of the record. I shall read portions of that statement and summarize others, if that pleases the chairman.

Senator ROTH. That is fine. We will include, of course, your full statement as if read.

Mr. LIPPE. Thank you, sir. As this committee knows, the Department has pursued an extremely aggressive policy of prosecution in the child pornography area. We strongly support legislative initiatives which will make our criminal statutes in this area even more effective than they presently are.

I am pleased to report to this committee that with just a few minor modifications which, parenthetically, I would add, in our judgment would strengthen the already proposed bill, the Department enthusiastically endorses S. 2398.

As we understand the bill as proposed, it would add to section 2251 of title 18, which prohibits the production and distribution of child pornography, a prohibition against the publishing of any advertisement for child pornography or for sexual activity involving children.

Specifically, it would prohibit advertisements for the receipt, production, or dissemination of any visual depiction of sexually explicit conduct of or with a minor, or offering participation in any act of sexually explicit conduct with such a minor if the person who publishes that advertisement knows or has reason to know that the advertisement is for material which depicts sexually explicit conduct or offers participation in such heinous conduct.

In addition, as we understand the proposal, the publisher of the advertisement must know or have reason to know either that it will be transported in interstate or foreign commerce or mailed, or the advertisement must actually be transported in interstate or foreign commerce or mailed.

I will explain some of our views on those distinctions in just a moment. The bill also amends two aspects of the definition of "sexual explicit conduct" in the present statute.

As the chairman has already mentioned, the transportation statutes would become gender neutral, thus extending their protection to males. We wholeheartedly endorse that amendment.

Finally, the bill would amend two aspects of the definition of "prohibited sexual conduct," as it appears in section 2423 of title

18. It would do away with commercialism, and we again strongly support that. One of our proposed modifications would go even further than the mere doing away of commercialism, as I will explain in just a moment.

The Department supports the proposed creation of an offense for mailing or interstate shipment of advertisements for child pornography. While section 2252 makes illegal the mailing or interstate transportation of child pornography, it would be entirely consistent with the overall statutory scheme of the child pornography laws to make criminal the mailing of advertisements for such material.

Indeed, such a provision would be consistent with section 1461 of title 18, which makes criminal the mailing of advertisements for obscene material as well as the mailing of the obscene material itself.

The Department also strongly endorses the proscription of the mailing or interstate shipment of proposals to engage in sexual conduct with a minor. Although sexual abuse of children is a matter that traditionally has been dealt with effectively by local child abuse or sex offense statutes, there is ample statutory precedent for Federal involvement in what is otherwise essentially a local criminal activity when the mails or the facilities of interstate commerce are used. Certainly we endorse any legislation that can bring the full force of the Federal law enforcement mechanism to prevent these kinds of heinous acts of abuse on our children.

By way of example, we have statutes which make criminal the interstate communication of a kidnaping threat, and even the use of a wire communication for the transmission of wagering information. Certainly if those kinds of activities can be proscribed federally, certainly activities which deal with the abuse of children can and should similarly be proscribed at the Federal level.

I said earlier that we had certain minor modifications to the bill which we would suggest. I will not go into the detailed mechanism of how we would achieve the objective that those modifications seek, but I will merely outline what those objectives are and would be glad to work with the staff of this committee to see if we could reach accommodation on those modifications. We have worked closely with your staff in the past on this bill, and I am confident that we can continue to do so.

First, we would propose that certain language be added or rearranged within the bill to make clear that there are two alternative bases for jurisdiction under this bill. One is that the offender have knowledge of so-called future mailing, know or have knowledge, or have reason to believe that the material will be mailed; or that whether he has knowledge or not, that the material is actually mailed.

So if it is actually mailed or distributed in some manner we do not have to prove that he knows that. Right now the way the bill is drafted, in our judgment, one could argue that we have to prove that he knew it was mailed. We do not believe that we should be limited.

Further, we should again work with language that would make it very clear that the Government in prosecuting these cases need not prove that the offender knew the age of the victim depicted. We would suggest that we need prove only that the offender was

aware of the general nature and character of the material, and whether he knew that the material actually violated the statute or that it involved minors as defined is immaterial. The Government will prove that, but we do not have to prove that the defendant knew it. And we believe we could work out language to achieve that objective.

We would suggest one minor limitation, and that is to make the language in the bill clear that it does not proscribe pure art or pure product that comes from the imagination of an individual, and this tracks the language of the Supreme Court *Ferber* case which says that while statutes designed to proscribe abuse of children it will lend its support to, we cannot proscribe this kind of artistic, imaginary work, keeping in mind that what we are seeking to do here is to prevent the abuse of our children.

Further, we would suggest that we work on language to make it, again, clear that we are proscribing sexually explicit activity in which if only the child is involved that is all that need to be shown. Right now we believe some could argue that we must show that the child is involved in this explicit conduct with yet another person.

We do not believe the Congress intends that, nor do we believe that we should have to prove that. If the child, him or herself, is singularly being abused, that should be enough.

And last, as I stated earlier, Mr. Chairman, we certainly endorse the removal of the commerciality requirement in section 2423. We would go further than that. In our experience in this area, we know that there are those folks, these pedophiles who transport children across State lines for their sole gratification. And if they do not depict or distribute, they do not film or distribute those heinous acts, we believe that the mere transportation for their own awful, sexual gratification ought to be federally proscribed, and would suggest working on language to achieve that objective.

That, Mr. Chairman, summarizes the modifications which we would suggest be made to the bill, and as I stated before, we would be most pleased to work with your staff to see if we can work out some language to achieve those objectives.

That concludes my statement, Mr. Chairman, and I would be glad to respond to any questions that you or your staff may have.

[Prepared statement follows:]

PREPARED STATEMENT OF LAWRENCE LIPPE

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE,

I am pleased to appear today to discuss S. 2398, the "Child Sexual Abuse and Pornography Act of 1986."

The Department of Justice has pursued an aggressive policy of prosecution in the child pornography area. We strongly support legislative initiatives which will make our criminal statutes in this area even more effective. I am pleased to report that, with a few minor modifications, the Department can enthusiastically endorse S. 2398.

The bill would add to section 2251 of Title 18, United States Code, which prohibits production and distribution of child pornography, a prohibition against the publishing of any advertisement for child pornography or for sexual activity involving children. Specifically, the bill would prohibit advertisements for the receipt, production or dissemination of any visual depiction of sexually explicit conduct of or with a minor, or offering participation in any act of sexually explicit conduct with a minor, if the person who publishes the advertisement knows or has reason to know that the advertisement is for material which depicts sexually explicit conduct or offers participation in such conduct. In addition, the publisher of the advertisement must either know or have reason to know that it will be transported in interstate or foreign commerce or mailed, or, the advertisement must actually be transported in interstate or foreign commerce or mailed. The bill also amends two aspects of the definition of "sexually explicit conduct" in 18 U.S.C. 2255.

The bill would delete from sections 2421, 2422, and 2424 of Title 18, United States Code, which proscribe interstate transportation for prostitution and similar purposes, references to the feminine gender. It thus will extend the protection of these statutes to males.

Finally, the bill would amend two aspects of the definition of "prohibited sexual conduct" in 18 U.S.C. 2423. Section 2423 prohibits the interstate transportation of minors for

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prostitution or other commercial sexual activity. As amended, the definition in section 2423 will be identical with that in 18 U.S.C. 2255 after its amendment by this bill. The bill also amends 18 U.S.C. 2423 by broadening its coverage to include those who transport minors in interstate commerce with the intent that the minors engage in sexual conduct which will be recorded and distributed, whether for commercial gain or not.

II.

The Department of Justice supports the proposed creation of an offense for the mailing or interstate shipment of advertisements for child pornography. Section 2252 makes illegal the mailing or interstate transportation of child pornography, and it would be entirely consistent with the overall statutory scheme of the child pornography laws to make criminal the mailing of advertisements for such material. Indeed, such a provision would be consistent with 18 U.S.C. 1461, which makes criminal the mailing of advertisements for obscene material as well as the mailing of the obscene material itself.

The Department also endorses proscribing the mailing or interstate shipment of proposals to engage in sexual conduct with a minor. Sexual abuse of children is a matter that traditionally has been dealt with by local child abuse or sex offense statutes. However, there is ample statutory precedent for federal involvement in essentially local criminal conduct where the mails or facilities of interstate commerce are used. For instance, 18 U.S.C. 875 makes criminal the interstate communication of a kidnapping threat, and 18 U.S.C. 1084 makes it a criminal offense to use a wire communication facility for the transmission in interstate or foreign commerce of wagering information. It is the interstate commerce aspect that provides the basis for federal jurisdiction in these statutes, and that same basis would be available here, as well as use of the mails. It is as appropriate for the Federal Government to assert jurisdiction over facilitation of acts of child molestation by use of the mails or facilities of interstate commerce as it is for the Federal Government to assert jurisdiction over facilitation of the crimes which underlie existing statutes.

III.

While we support S. 2398, we believe that several minor modifications would improve it from the standpoint of future prosecutions. First, we recommend that proposed 18 U.S.C. § 2251(c) be amended to distinguish clearly between the two alternative bases for jurisdiction: 1) knowledge or reason to know, on the part of the violator, that the advertisements will be shipped in interstate or foreign commerce or mailed, and 2) actual shipment or mailing. As currently drafted, subparagraph (B) may be misconstrued to require a showing that the defendant knew or had reason to know that the advertisement had actually moved interstate or been mailed. This part of the bill should be restructured to assure that the knowledge requirement applies only to future transportation or mailing of the advertisment. Such an amendment would be consistent with present section 2251.

We also recommend revision of another aspect of the bill's knowledge requirement in proposed section 2251(c). The bill requires that the violator know or have reason to know that the advertisement is for material which, in fact, depicts sexual conduct involving a minor or offers participation in sexual activity with a minor. A court could interpret this to mean that the government must prove the violator knew the age of an involved minor or that the material was violative of the statute. This burden of proof would be extremely difficult to carry. This difficulty could be cured by deleting proposed subparagraph (c)(2)(A), inserting "knowingly" before the word "makes" in the first line of proposed subsection (c), and stating in the legislative history that "knowingly" only requires the government to show that the violator was aware of the general nature and character of the material and specifically does not require the government to prove the violator knew the age of the minor involved. This issue arose in connection with the original child pornography legislation that was enacted in 1978, and such a clarification would be consistent with the legislative history of that statute.

We also suggest that the words "which involved or would involve in its production" be substituted for "involving" in subparagraph (c)(1). This would make it clear that the provision is aimed at actual child abuse and would parallel the language of present 18 U.S.C. 2251 and 2252. As drafted, the language could support an interpretation that advertisements for drawings or paintings of imaginary children are banned. Such an overbroad, though unintended, interpretation would, in our opinion, render the statute constitutionally vulnerable. See New York v. Ferber, 458 U.S. 747, 764-65 (1982).

One further amendment of proposed section 2251(c) we recommend concerns advertisements "offering participation in any act of sexually explicit conduct with any minor." We believe the word "participation . . . with" may be misinterpreted to exclude forms of "sexually explicit conduct" as defined in section 2255, which do not involve the actual partcipation of any person other than the minor. Thus, we recommend amending proposed section 2251(c)(2) to read: "seeking a minor to engage in sexually explicit conduct."

The Department also resommends a modification of section 5 of S. 2398, amending 18 U.S.C. 2423. Specifically, while we support broadening section 2423 to cover the noncommercial activities of visual recording and distributing as proposed, we would go further. We have little doubt that much transporation of children across state lines for sexual activity is for personal gratification and not commercial gain. We believe the commercial restrictions presently in 18 U.S.C. 2423 should be entirely eliminated, by deleting ", if such" through "by any person" in 18 U.S.C. 2423(a)(2). Those who transport children across state lines for their own sexual pleasure should be prosecutable, whether they film the activities or not. The Department recommended that section 2423 cover noncommercial transportation of children for sexual purposes when this statute was under consideration in 1977 and when it was subsequently amended by Public Law 95-225 (February 6, 1978). We continue to adhere to the views we expressed then.

The Department has no objection to making sections 2421, 2422, and 2424 of Title 18 gender neutral. We would point out that section 2423, which is already gender neutral, would cover, if amended as we propose, the kinds of sexual activity involving children sought to be covered by these other statutes. The latter statute is directed specifically at minors, while the other three, if amended as proposed, would cover all persons.

I am grateful for the opportunity to present the Department's views on this important piece of legislation.

Senator ROTH. Thank you very much, Mr. Lippe. We look forward to working with you and the Justice Department in strengthening the bill. There is no question, I take it from your testimony, however, that we are breaking new ground. That this is desirable from that standpoint.

Mr. LIPPE. Absolutely. The void, as you so aptly pointed out earlier in your opening remarks, to proscribe this kind of heinous conduct, and yet to have a gap whereby you can advertise for its existence and thereby promote it, is ludicrous, and we wholeheartedly support doing away with that gap.

Senator ROTH. Are there any other areas that need to be covered?

Mr. LIPPE. In this particular area of child molestation and child pornography, I am confident that we have pretty well covered the area as best we can determine, and the committee can rest assured that if in our prosecutive experiences we come across any further gaps of which we are presently unaware given our mutual objectives to stamp out this kind of heinous conduct, we will not hesitate to bring it to the attention of this committee.

Senator ROTH. Mr. Lippe, I understand that many law enforcement organizations, both State as well as Federal, will place ads in newspapers in an effort to develop suspects. Will this legislation in any way prevent that from continuing?

Mr. LIPPE. In our judgment, it will not. As in other undercover operations in this and many other areas of criminal law, when law enforcement personnel are involved in committing acts which would otherwise, but for the law enforcement objective and the law enforcement character activities, be criminal, it is well settled that those activities are not criminal.

In particular, we are aware of a variety of activities engaged in by the U.S. Postal Service in this area, and are competent that when done in furtherance of a controlled law enforcement investigative context subject to guidelines which we have worked out with the U.S. Postal Service, in no way will the enactment of this legislation, in our judgment, affect the ability of the Postal Service and other law enforcement organizations to continue their commendable activities.

Senator ROTH. Let me ask you this question. Would this legislation if enacted cover those who operate child sex rings and child pornography rings through computers and computer bulletin boards?

Mr. LIPPE. In our judgment, a very credible argument can be made that it will. As this committee is aware, there is a separate piece of legislation that was proposed earlier last year. Indeed, I testified on behalf of the Department. That is S. 1305, which deals particularly with the use of computers as they relate to child pornography. But, notwithstanding that separate piece of legislation, we believe, as I stated, a credible argument could be made that the bulletin board type advertisements would be proscribed by this statute.

If there is doubt on the part of the committee, or its staff, again, we would be pleased to sit down if perhaps more explicit lauguage need be added, if at all. It is not a question that lends itself to a clear yes or no answer, I am sorry, sir.

Senator ROTH. In your prepared statement, you suggest that we alter the "knowingly" language in subsection (c), in the proposed new subsection (c), in order to assure that there will be no burden on the prosecution to prove that the defendant knew the precise age of the minor. Now, under current provisions of the Mann Act, the Government need not prove a defendant knew the age of the minor. Given this fact, would it not be enough to make reference to that in the committee report, or do you think the language has to be changed?

Mr. LIPPE. I would have to spend a moment just comparing the two languages, sir, but I believe that the manner in which we can slightly change the language of the proposed bill is a rather simple way, and I think we can deal with that. Perhaps the suggestion the committee chairman has just made is equally sufficient, but, again, I would prefer, before giving a definitive response, to sit down with staff and just work that out. It will not take major modification by any means.

Senator ROTH. I take it you are familiar with the new Supreme Court case, *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico.*

Mr. LIPPE. I certainly am, sir.

Senator ROTH. Is there any doubt after that case that the first amendment is no bar to a statute that bans the advertising of illegal activity, in this case, child pornography?

Mr. LIPPE. In my judgment, after a careful reading of it, and discussing that case with members of my staff, I am not only confident that there is no longer any doubt, I think that case, indeed, strengthens the constitutionality argument in favor of the bill that this committee is proposing.

Senator ROTH. One final question. For this law to take effect, all the individual has to do is use the mails. It does not have to be mailed in interstate commerce, does it? Is it not sufficient to mail it?

Mr. LIPPE. Yes.

Senator ROTH. That is correct.

Mr. LIPPE. Because the mail is an interstate facility.

Senator ROTH. Mr. Lippe, we look forward to working with you and your department on this matter, and I appreciate very much your strong endorsement of the legislation.

Mr. LIPPE. We appreciate the opportunity to be here. Thank you.

Senator ROTH. Thank you. Our next witness is Mr. Bruce Taylor, general counsel for the Citizens for Decency Through Law, a national organization, headquartered in Phoenix, AZ. Mr. Taylor has considerable experience in the area of obscenity and child pornography, and we welcome his comments today.

Mr. Taylor, your full statement will be included as if read so you may summarize to the extent you desire.

STATEMENT OF BRUCE A. TAYLOR, GENERAL COUNSEL, CITIZENS FOR DECENCY THROUGH LAW, INC.

Mr. TAYLOR. Thank you, Mr. Chairman, and thank you for the opportunity to be here today. I will briefly summarize for the chairman and for the committee record why it is that we think as part of the law enforcement community this bill is so much needed. As explained by the Department of Justice, legally the bill will have no problem being upheld as constitutional in the Federal district courts and the U.S. Supreme Court.

The changes against advertisement and gender and the other technical changes that have been made in the bill are not the kinds of changes in the law that are going to give a serious challenge to the validity of the bill.

But the reason that making advertisements and the persons who are involved in the actual trading of the children in the pictures is so important is because that is the one stage in the investigation process where law enforcement agents, the police, the customs agents, the postal inspectors, sheriffs' departments, sometimes the child abuse agencies, welfare people and even guidance counselors and parents can actually stop an abuse from happening before it becomes the reality of a child pornography magazine or videocassette, or a person gets snatched into prostitution or ends up being molested by a neighbor. What I mean by that is oftentimes officers, as you have noted, when they advertise in the magazines themselves or they join the clubs, or they engage in correspondence with pedophiles, and they make deals, or they make arrangements for either the trading of the child or of pictures. And trading of pictures is almost always a predicate for the actual trading of children.

Most pedophiles will make sure that they get a piece of your child pornography before they will give you some of theirs. So it all works together. The law enforcement officers identify a person who is already engaging in this kind of activity, but they may usually not have ever been able to prove the person has either distributed pictures so that they could prosecute them under existing sections 2251 or 2255, or that that person has actually used a child, or has a child that he is willing to trade.

That is frustrating obviously to the policemen because if they cannot convince the pedophile to send him a piece of child pornography through the mail or to have some ordered through Customs, then they have no crime to charge him with even if the person has

advertised for it, or has offered it. So they know the person who is doing it. He is doing it with other people who have agreed to the conditions he may have established, and maybe the law enforcement agencies have not been able to agree to those conditions.

As you know, especially with the male prostitution and pedophile problem, the initiation process to get into the pedophile rings or the male homosexual child abuse rings is impossible for law enforcement to meet. Therefore, the ability to prosecute someone when they make the deal, just like in prostitution on the street, when you prosecute in city court, or State court, for soliciting for prostitution, or when you make a deal with a pimp, you do not actually have to cause the act of the crime of the abuse of the child in order to make the case against the person you know is engaged in that criminal activity.

Our organization, Citizens for Decency Through Law, is interested in this because since 1957 our group has hired lawyers who are former prosecutors with experience in obscenity cases to make ourselves available to other law enforcement agencies. That is what we do for a living. We travel around the country putting on seminars for police and prosecutors and engaging in trials.

We are hired as special counsel. We write briefs. So we are in contact with many of the police officers and prosecutors in the field actually doing these kinds of cases on a day to day basis in almost every State and with the Federal Government. And there is now a network of very good investigators, some good prosecutors in both the U.S. attorneys' offices, and in many of the bigger States' attorneys' offices who are working hard on this problem, and this is the one loophole that we are faced with. If the Congress closes that loophole, you will not only see more actual prosecutions of child pornography distribution and Mann Act violations because they will become easier to pursue, you will be able to get closer to the defendant and make a case. But you will find that the numbers of law enforcement agencies and U.S. attorneys' offices who get into this area will increase because they will see that there is an end to the road that they can achieve success.

That is a frustrating point at this stage in our law because a lot of law enforcement agencies who don't have the training or the money to get as sophisticated as the best are in order to catch people at their game will be able to engage at least in part in the investigative process under the provisions of this kind of bill. That will encourage officers to get into the fray, and that will mean more cooperation among more Federal agents and different kinds of city agencies, and I think that this is the kind of bill that we just absolutely have to have in order to strengthen the enforcement of the existing sections of the Child Pornography Act that was strengthened in 1984.

We do support the offered suggestions of the Department of Justice as to amendments. Some of them, I think, should not be necessary if the courts were consistent with the U.S. Supreme Court interpretation of scienter and knowledge. They would not make the Government prove an offender had knowledge of the actual age of the minor. They would make the Government prove that the material was child pornography as existing law makes you prove. And

they would make you aware that the material does have pictures of people who you should have reason to know are minors.

That is consistent with existing law, and the courts, I think, generally—most of the State courts will follow that interpretation. Unfortunately, though, there are courts that give an interpretation to the law—and in all fairness many of them feel that they must as giving the benefit of the doubt to the defendant—and will place an added burden on the Government that was not intended by Congress and is not consistent with the interpretations of the Supreme Court.

The problem with that is that by the time it gets to the Supreme Court it may be 2 or 3 or 4 years from now and the frustration is there. Like I said, I think the legislative history of the prior law and the Supreme Court precedent supports the interpretation that the person only has to know that the material is sexual activity; that, in fact, it is a minor; and that the person had reason to know that it was a minor, not that they actually knew.

Just like this latest case where a young girl named Tracy Lordes, who has been in hundreds of porno videocassettes and movies and magazines, and appeared in even magazines like Penthouse and some others. She now turns out to have been 15 when she entered the hardcore industry. So everybody is scrambling to try to get it off the shelves.

But some of those dealers, out of greed, are still going to sell that material. When we catch them doing it now, they know that that girl is 15. That is why they are asking triple and quadruple the price of the movies. We will be able to prosecute them even though we cannot show that they knew before that she was a minor. Even if this bill was changed, or existing law were applied, we would not have been able to prosecute them if they could not have—a jury could not have concluded beyond a reasonable doubt that she was a minor unless we could prove it.

I think that the law now should cover the problem, and if the Supreme Court were to rule on it, I think they would rule in our favor and in favor of the Government's position. But those kinds of changes that the Department suggests are the kinds that would make it easier to get over that first hurdle of the motions that you have to deal with in the trial court level, and to that extent, we would support them. Thank you, Senator.

Senator ROTH. Thank you, Mr. Taylor, for being here today. Let me ask you two or three questions. First of all, do you agree that there is a link, a direct link, between child pornography and sexual abuse of children?

Mr. TAYLOR. In almost every case where an adult has a molestation of a minor, there is either the use of preexisting child pornography or adult pornography to help seduce that child. And almost everytime that a pedophile is caught, he has a collection of child pornography.

The FBI has an expert in this area named Ken Lanning, and he gives seminars to law enforcement officers, and that is the one thing he says is if you are going to go on a child abuse case, if a parent or social worker calls up, and you are going to go there to investigate the abuse of a child, then ask in the search warrant for the right to look for collections of pictures and child erotica and

child pornography and adult pornography because they all collect it. They never destroy it. All they will ever do is maybe trade it.

So that pedophiles, because many of them are fixated by age—they only like kids that are 10 to 12, so that once their boy or their girl turns 13, they are gone. But the pictures are always of a 12 year old. So they can remain sexually—masturbation practice linked to that age.

So as we know in the field, prosecutors use that kind of material as modus operandi and mental intent evidence all the time to prove the actual case when you find that kind of material. Rape cases often involve a man who collects pictures of blonds, and all of his victims are blonds. Or he collects pictures of certain kinds of weight and size boys, and that is the kind of person he abuses. So we know that the kinds of pictures people will collect and use and buy and sell are the ones that tailor their own sexual fantasies, and that is what the Government is trying to prevent is persons acting out their sexual fantasies when those fantasies involve children.

So there is an absolute link that we can never get away with, and as the Supreme Court noted, you are never going to be able to stop as much of the abuse unless we can prevent ourselves from dealing so casually in the pictures.

Senator ROTH. A couple of related questions. Is there adequate cooperation between the States and the Federal Government as to sex offenders? In some of our hearings, there was evidence that many of the sex offenders move from State to State. But there was not much exchange of information. Has that situation improved?

Mr. TAYLOR. It has improved, but it will never be adequate, and there is a lot of reasons for that. One is that the laws are different among the States, and the Federal involvement is only in interstate commerce. You have to use the mails; you have to use the Customs; you have to use the telephone, or a truck system.

Therefore, the locals are on their own much of the time, and it is hard to get the Federal jurisdiction even attached on some of these crimes. The other reason is that it is a fairly new area. We have had obscenity laws on the books, and they have been primarily enforced by the Federal authorities in the 1960's and the very early 1970's, and then the Federal authorities did not enforce the law at all, and the State authorities started doing it in the 1970's in the big cities.

There just has never been an opportunity for child pornography to be an issue, first of all, and for the Federal and State authorities to both be working on it at the same time until the last few years.

There are some major improvements. One is that the big city police departments have almost all set up a sexually exploited child unit or all have a person who has attended a seminar given by another city police officer, or at the FBI Academy. So now there is a network of local police. The FBI Academy has set themselves up to coordinate these efforts, to get these officers to know each other, and to coordinate their findings and to submit what they find to Washington.

The FBI has allowed themselves to become a depository of child pornography and pictures so that people who are looking for missing children and are trying to identify makers and distributors of

child pornography can have a place to go where there is a library of material.

These are all new developments that have only taken place in the last few years. So it is improving. One of the things that I think will improve it more is laws like this that make the Federal law much closer to the State law, meaning that as the Supreme Court said in 1977 where a man was prosecuted for mailing obscene material in Iowa, even though it was not a crime to sell it in Iowa, the Supreme Court said, well, the Federal Government can be relied on to handle a certain part of the problem, and maybe the States will leave it to them.

I think that for too long the States have been trying to deal with aspects of the child pornography problem because there was this gap in the Federal law, and if the Federal law closes, that will allow the expenditure of FBI and Customs and Postal time to coordinate on investigations that last week, or today, an agent of the FBI would have to say, listen, since you cannot prove that the material has crossed the line, all you have is the ad, we cannot even help you yet.

So that is one of the things that is going to improve cooperation, but it is also the kind of problem that will take time and education. And I think that both the Federal Government being the one that everybody can look to is on the right track in bringing city police officers to Quantico. And I think that is probably the best development that has ever happened to strengthen this network of police officers.

Senator ROTH. My final question has to do with State laws. Has any effort been made to have a uniform code, a uniform law, in the area of child pornography and child sex abuse?

Mr. TAYLOR. There have been a few proposals. There are some model legislation proposals that have been circulated among State legislative organizations like American Legislative Exchange Council, and some of the bar associations have considered this.

There has not yet been a major one like the American Bar Association did with the model penal code which because of the American Bar Association's size and notoriety everyone knew about their model penal code. There has not been that yet. So the States are all struggling.

But one of the interesting things that after the *Ferber* decision in 1984, the Supreme Court says here is what child pornography can be defined as because New York did it, and New York's law is constitutional. Then, we saw most of the States that did not have that kind of a law passing a law and just taking the language from New York.

So almost by default you end up with a certain form of uniformity. There is still differences among the States, but that is not as much a problem in this area of obscenity and child pornography and prostitution as it is in many other types of crimes like assault or gambling or drugs.

And the reason is that the Supreme Court defines the material. In 1973, the Supreme Court defined obscene and every single State except California uses that definition of obscene. California still has kind of a different definition. But whether or not you prosecute a person in Federal court in any Federal district in this country, or

in State court in any court, no matter what the statute says, they are still going to have to look to the Supreme Court's definition.

Child pornography, even though you may define certain kinds of sexual acts a little bit different, is basically sexual couduct with a minor. Some allow you to prosecute for exhibition of the genitals. Some allow you to make sure that it has actual conduct. Some allow masturbation; some do not. But basically the kinds of activities that minors to be engaged in are prohibited are uniform across the country.

And even though the exact language does not track, there is enough similarity because the Supreme Court sets the standards in this first amendment areas, that uniformity is probably not as necessary as it would be in some of the narcotics and gun-running problems that the Federal Government has to deal with.

Senator ROTH. Thank you very much for being here today, Mr. Taylor. We appreciate your contribution.

Mr. TAYLOR. Thank you, Senator, and good luck with the bill.

[Prepared statement follows:]

Prepared Statement of Bruce A. Taylor

Mr. Chairman and Members of the Committee:

My name is Bruce Taylor and I am General Counsel of a non-profit organization known as "CDL", Citizens for Decency through Law, Inc. CDL was formed in 1957 in Cincinnati by a lawyer named Charles H Keating, Jr. He became a member of the President's Commission on Obscenity and Pornography and authored one of the two Dissenting Reports in 1970. CDL maintains a legal staff of three full-time attorneys who provide free legal assistance to police and prosecution agencies nationwide. At present our legal counsel are Paul McCommon, former Assistant Solicitor General for Fulton County in Atlanta, Georgia, who helped close all of that County's hard-core pornography stores and theatres by 1981, and Benjamin Bull, former Assistant County Attorney in Fairfax, Virginia, and former Assistant City Attorney in Norfolk, Virginia, where he closed Norfolk's pornography theatres, bookstores, and massage parlors. I gained my experience as Assistant Prosecutor and Assistant Director of Law for the City of Cleveland, where I prosecuted 600 obscenity cases under Ohio law, handled over 100 appeals, and closed 33 of Cleveland's 56 hard-core outlets between 1974 and 1977. I have argued before the Supreme Courts of Ohio and Colorado, the U.S. Court of Appeals for the Sixth Circuit, and argued the case of Flynt v. Ohio in the U.S. Supreme Court in 1981. Since joining CDL in 1979, I have conducted hundreds of training seminars for police and prosecutors on obscenity law, search and seizure, evidence, trial tactics, appeals, and on organized crime and pornography syndicate intelligence and operations.

In the past few years, a growing interest has surfaced in prosecuting child pornography and abuse cases. State and city police, Customs agents, Postal inspectors and the FBI have increased their efforts to educate themselves on the traffic and offenders in the child exploitation business. See: Juvenile Justice Digest, Vol. 11, No. 15 (Washington Crime News Service, 8-8-83), LECC Network News, Vol. 2, No. 3 (U.D.D.O.J., Fall 1985). Networks of cooperation have formed among

city police and county sheriffs offices and the federal authorities. The FBI Academy has held seminars to bring experienced child pornography investigators together to share their knowledge and bolster stronger criminal cases. FBI Special Agent Ken Lanning has educated and brought together many of the best agents and officers in this area. There are now many good people working on this problem including Det. Bill Dworin of the Los Angeles Police Department, Lt. Tom Rodgers of the Indianapolis Police Department, Special Agent Roger Young of the Las Vegas FBI office, Postal Inspectors Paul Hartman of Cleveland, Dan Mihalko of New York, and John Ruberti of Chicago, Customs Agents Jack O'Malley of Chicago and Jim Charlton of South Carolina, Capt. Richard McIntosh of the Cleveland Police Department, Det. Joyce Lingel of Tucson Police Department, Det. James Phillips of Columbus, Ohio, Police Department, Det. Tom Dittmar of Seattle Police Department, Det. Al Simballa of Albuquerque Police Department, and Pete Petruzzellis of the Metropolitan Police in Toronto, Canada. However the loyalty of these officers, the problem spreads, and prosecutions have been too few and more difficult. Father Bruce Ritter of Covenant House in New York City now has shelters for children of the streets in several cities and sees the proof of our neglect as a society and lack of success as law enforcement professsionals. Several books and reports document the problem and offer guidelines for dealing with it. For example: Dr. Ann Burgess, et al., Child Pornography and Sex Rings (Lexington Books, 1974); Dr. Shirley O'Brien, Child Pornography (Kendall-Hunt, 1983) and We Can! Combat Child Sexual Abuse (University of Arizona 1982); Dr. Sam Janus, The Death of Innocence (Wm. Morrow, 1981); Robin Lloyd, For Money or Love: Boy Prostitution in America, (Vanguard, 1976); Trudee Able-Peterson, Children of the Evening (Putnam, 1981); Linda Sanford, The Silent Children (Doubleday, 1980); Dr. Leroy Schultz, et al., The Sexual Victimology of Youth (C. Thomas, 1980); Sexual Abuse of Children (American Humane Assoc. 1980); Sussman and Cohen, Reporting Child Abuse and Neglect: Guidelines for Legislation (Ballinger, 1975); Wilham Katz,

Protecting your Children from Sexual Assault (Young America, 1983); Margaret Hyde, Cry Softly! The Story of Child Abuse (Westminster, 1980); Carol Clancy, et al., Pornography: Solutions Through Law (National Forum Foundation 1985); Jerry Kirk, The Mind Polluters (T. Nelson, 1985); Dr. Victor Cline, Where Do You Draw The Line? (B.Y.U. Press, 1974); Hazelwood, Dietz, Burgess, Autoerotic Fatalities (Lexington, 1983); William Stanmeyer, The Seduction of Society (Servant, 1984). See also: Interim Reports of the Select Committee on Child Abuse-Neglect and Child Pornography (1978 and 1982) of the Texas House of Representatives; "Sexual Exploitation of Children", Report of Illinois Legislative Investigating Commission (1980); Child Molesters: A Behavioral Analysis for Law Enforcement, by Ken Lanning (FBI Academy, 1986).

The problem today is that the books and reports on this subject have been true to life for the past ten years and are true today. The officers and professionals continue to investigate and treat those cases uncovered. The reality is that there was little serious prosecution committment ten years ago and there is only sporadic and spaced effort committed today by the nation's state and federal prosecutors. The numbers of cases taken to court have gone up, but the increases have largely followed changes in child porn and abuse statutes which raise the awareness of the issue, put pressure on the criminal justice system, and encourage success in getting meaningful convictions. We saw few federal child porn cases after 1978 when the federal law was passed because it was so restrictive. We now see many more following the 1984 amendments which made it worthwhile to pursue such cases. Now that agents and investigators are in place, knowledgeable and dedicated, they are calling for new and better tools. As cases were made on individual molesters and child porn collectors, the officers learned that these people, mostly men, were deeply into a network of clubs, mail order schemes, "adult" bookstore contacts, and pornography magazine advertisements. Often the officers would break a ring or a case before

the traffic in child pornography took place. The ads and offers to provide child sex or materials were used to stop the abuse. However, the officers need a way to charge the offender with the acts of soliciting, pimping, and offering the kids and pictures so that the crime can be punished before more damage is done to children and without allowing the offender to escape judgment.

S. 2398 is another tool for law enforcement. There is no question about its constitutionality. The scienter requirement that offenders know the character and content of the material or activity will protect innocent people and prevent unknowing publishers from being subject to the law. Only those who know and intentionally commit the prohibited acts can be indicted under the law as S. 2398 in worded. State laws on soliciting for prostitution have been universally upheld and child exploitation, as defined in Sections 2251, 2255, and 2421, are equally valid. Many states have obscenity statutes which prohibit advertising obscene material, and are universally upheld. There have been convictions upheld by the Supreme Court which involved ads, such as Roth v. United States, Alberts v. California, 354 U.S. 476 (1977), Ginzburg v. United States, 383 U.S. 463 (1966), and Hamling v. United States, 418 U.S. 87 (1974). The intent of the courts to uphold child pornography laws as a "compelling interest" of state and federal legislatures is clear from New York v. Ferber, 458 U.S. 747 (1982). The federal courts have upheld the new federal child pornography and exploitation statutes. U.S. v. Miller, 776 F.2d 978 (11th Cir. 1985), U.S. v. Tolczeki, 614 F.Supp. 1424 (N.D. Ohio, E.D. 1985), U.S. v. Reedy, 632 F. Supp. 1415 (W.D. Okla. 1986), U.S. v. Hale, 784 F.2d 1465 (9th Cir. 1986). See also: Faloona v. Hustler Magazine, Inc., 607 F.Supp. 1341 (N.D. Tex. 1985). State child porn laws have been and continue to be upheld. Raymond Heartless, Inc. v. State, 401 A.2d 921 (Del. Sup. Ct. 1979), State v. Lodge, 711 P.2d 1078 (Wa. Ct. App. 1985).

More is needed, however. More will always be needed. Prosecutors seem to under prosecute for a variety of legalistic reasons, which are

really poor excuses. After the Congress enacted the 1978 law, it was ignored because child porn had to be "obscene" and prosecutors didn't know or feel that non-active displays of genital nudity could be obscene. The Delaware case cited above proved that if a prosecutor used the obscenity law correctly, convictions could be obtained for "soft-core kiddie porn" like the famous Lollitots magazines. While a prosecutor in Cleveland, I obtained a search warrant for the Cleveland Police to confiscate and prosecute on all copies of Moppets and Lollitots magazines found in Cleveland's "adult" bookstores. These were just as much "child pornography" as the explicit hard-core pictures the federal prosecutors were declining to prosecute on, unless the hard-core child pictures also contained violence, or animals, or the adult offenders, or were by a major dealer, or a repeat offender, etc, etc. When the 1984 amendments raised the age of protection to eighteen and removed the commercial and obscenity requirements, more cases could be brought and more cases have been brought. Now the law enforcement community demands more help. Congress must give it to them. Unfortunately, the "prosecutors" are still treating some aspects of the law enforcement effort with technical apathy. For example, the U.S. Court of Appeals for the Ninth Circuit, in U.S. v. Hale, 784 F.2d, at 1469-70, held that Customs agents could not seize child pornography in plain view during the execution of a valid seach warrant. In my opinion, the Ninth Circuit, which is notorious for taking the most favorable viewpoint for pornographers, was clearly and horribly wrong in interpreting Supreme Court cases to achieve such an unacceptable result. The U.S. Department of Justice and the office of the Solicitor General did not even ask the Supreme Court to review the decision. Such a "policy" decision by the lawyers responsible for enforcing the child protection laws of Congress is totally indefensible. The Supreme Court would have granted certiorari and upheld the seizure. The lawyers in the Department of Justice are not evil for letting this decision stand, but this illustrates how the handcuffs put on the police continue to

frustrate the efforts to deal with the problem of the abuse of the children. Congress must drive one more mile for these children, give the officers one more tool to work for these children, take one more excuse from the criminal justice system. Det. Dworin of the Los Angeles Sexually Exploited Child Unit, one of this Country's best child porn investigators, said the traffic is so great in California that they can't stop it with the laws and lack of support he now has to suffer with. His Chief of Police, Daryl Gates, stated last year that child abuse is "of such enormous proportions as to be beyond the control of any one agency". There are many police who will die trying to help these children by arresting their exploiters. There are many children who will die before they get that help. Congress must help both with all it can do within the law. Senate Bill 2398 is a good bill with no good reason not to be on the books. The passage of S. 2398 will also encourage local efforts. The states will follow your lead. Many states have already gone further, as New York and 20 states did in passing the non-obscene child porn laws upheld by the Ferber decision. At least seven states criminalize the mere possession of child sex pictures; Minnesota (1982,1983), Arizona (1983), Nevada (1983), Alabama (1984), Ohio (1984), Texas (1985), and Florida (1985). These are bold steps, but worth taking. Congress must continue to join in and lead this effort. Make things happen.

Senator ROTH. Our next witness is Susan Baldwin, who is director of the Victim/Witness Assistance Program for the Delaware Department of Justice. Ms. Baldwin, we are very pleased to have you here today, and look forward to your sharing your experiences with us.

STATEMENT OF SUSAN BALDWIN, DIRECTOR, VICTIM/WITNESS ASSISTANCE PROGRAM, DELAWARE DEPARTMENT OF JUSTICE

Ms. BALDWIN. Thank you, Senator.

My name is Susan Baldwin, and I am the director of the Victim/Witness Assistance Program in the State of Delaware, attorney general's office. I am here today to talk with you about my experience and how it relates to the need for enactment of S. 2398.

I am a social worker by training and was employed by the attorney general's office in 1979 as their first social worker. For the first 5 years I was assigned to the prosecutorial unit known as the Rape Response Unit. In 1983, I was appointed to my present position and currently supervise the four components of our statewide program: the Notification Unit, the Rape Response Unit social workers, the Services Unit, and Project Repay.

I also handle a full caseload of 90 to 100 victim cases per quarter. Although initially I worked exclusively with sexual offense victims, my present caseload also includes victims of family violence, property crime victims, child physical abuse, and families of homicide victims.

The services I provide to victims include support counseling, explanation of the criminal justice system, referral for long-term therapy, close interaction with prosecutors on case decisions, trial preparation, court accompaniment, and many other related services.

The average caseload per quarter of the Rape Response Unit social workers in New Castle County is 250 victims. Of those 250 victims, 65 to 70 percent are children under the age of 18; 35 to 40 percent of those 250 victims are child victims of intrafamily sexual abuse. We usually have between 5 and 10 direct contacts with child victims or their families during the 3 to 10 months it takes to complete prosecution. The age of child victims currently active with us is from 5 months through adolescence.

I have worked with hundreds of children of sexual abuse. A significant number of cases involve both sexual abuse and child pornography of males and females. Within the past year in New Castle County we have seen an increase in the number of male children reporting sexual victimization.

I have never worked on a case where child pornography occurred in isolation. All the cases of child pornography that I have worked on also involve sexual abuse that was not only part of the photographic sessions but occurred separate from the actual photo sessions.

Many of the child victims I have met were sexually abused and photographed over long periods of time by their parents, step-parents and other persons in a position of authority or trust.

Children have related to me how adult and child pornography was used to induce them into sexual activity. Children have ex-

plained to me how their own pornographic pictures were used by the offender as a lever and a threat to coerce the child into continuing sexual activity. Children have also told me how their own pornographic pictures were used to ensure secrecy. Offenders have told these children:

> If you tell, I'll show the pictures to your friends. See, you're doing things to me in these pictures. You'll be in just as much trouble as I will. You're smiling here. No one will believe you didn't like it.

The dynamics of sexual abuse and child pornography are extremely complex. The children I have worked with have had long-term relationships with their abusers and exploiters. The impact on these children has been totally negative, and at times completely devastating.

Children vary in their reactions to, and recovery from, this abuse. I have worked with some children as young as 4 and 5 years old who have required inpatient psychiatric care. Symptoms have ranged from severe depression, self-destructive behavior, and suicide attempts, to hyperactivity, extreme aggression, delinquent behavior, and sexual acting out on peers and preschoolers. Children from very dysfunctional families have the poorest prognosis for recovery. A few children that I have worked with have shown remarkable coping skills, and backed by supportive family have made great progress.

In one particular case, the offenders, Francis Naughton, and his wife, Margaret, were involved with over nine different children. The sexual abuse and phototaking occurred on a regular basis over a 4-year period with most of these children. Through an investigation by the U.S. Postal Service, an ad was placed in Screw magazine, and Mr. Naughton was identified. A joint investigation by local Delaware police and the postal inspectors led to the identification and location of nine children. I worked with four of the Naughton's victims. The youngest child was a boy whose abuse began at age 8.

There were over 200 photographs seized at Mr. Naughton's home and office. You can actually see the physical maturation of some of these children in this pornography that was seized.

How did the Naughtons manage to create and maintain such a hold over their young victims? One of the girls that I worked with was in love with Francis Naughton; and over and over again, he told her how special she was. Two of the boys were her younger brothers who received money, gifts, special outings and trips, and his attention, companionship, and friendship. But for all the children, the Naughtons had insurance in living color. He bragged in his letters about having the children perform acts on him, on each other, on other adults and with objects, thereby convincing the children that if they told, they too would be in trouble.

He bragged about which children would do anything for him, and which ones needed more coercing. In Mr. Naughton's letters, he talked about wanting to meet Rog, the postal inspector, and sexually share the children with him. We know that Francis Naughton read and collected all sorts of pornography, films, and sexually-oriented newspapers. The sum of the evidence in this case fills a small room. We know he corresponded with another adult who shared his

sexual interest in children, but the identity of that person could not be ascertained.

Trading of child pornography through the mail and the actual trading and sharing of children often begins with advertisements. We need to prohibit this advertising, and S. 2398 specifically addresses this problem.

Margaret Naughton pled guilty in superior court and reluctantly testified for the State. Francis Naughton proceeded to trial, and through the testimony of four victims and the introduction of this pornography, he was convicted of nine felonies, including sexual offenses and sexual exploitation. He pled guilty in U.S. district court to sending obscene photographs in the mail, and received a 5-year prison sentence.

But Francis Naughton had his own distorted value system. In one of his letters to the postal inspector, he writes:

> You know Rog I guess the two worst things adults can do is rape and mess with kids, and I go along with that but dam it unless it happens to you—then some people might change their minds. I don't mean rape. I really believe a lot of guys like looking at pictures of kids and also would mess around with them if they had the chance but they just never get the chance and Jesus did I get some chances in my life. I never looked for it—it just happened.

Francis Naughton was only sentenced to 14 years in prison by superior court. He is waiting for his parole hearing. However, there are thousands of offenders like Mr. and Mrs. Naughton walking among us every day. Their victims fill our schools, live in our neighborhoods, and pass us on the street. We need creative legislation such as S. 2398 to provide added protection for our children.

I have seen the pain of sexual abuse and child pornography on the faces of Kathy, Winnie, Charlie, Debbie, Kevin, Larry, Denise, Keith, Marie, Joelle, and many others. I have observed their conflicts, their torment, guilt, shame, sense of betrayal, their misguided loyalties, and anguish. I have been hugged by some of these victims and hated by others. I have literally felt their tears. We cannot depend on young children to protect themselves from sexual abuse and exploitation through pornography. Children must depend on responsible adults for help. They depend on you, the lawmakers, to enact statutes that provide protection and fill the loopholes in existing legislation.

S. 2398 will prohibit the advertising of child pornography and will gender-neutralize existing legislation to afford added protection to male victims. I am pleased to be able to appear here today and share my experience with you and endorse the proposed legislation.

I would be glad to answer any questions you might have.

Senator ROTH. I appreciate very much your being here today because I think your testimony is particularly eloquent because you speak from personal experience.

I think one of the things that shocks me as much as anything, and the whole situation is unbelievable, is that you say that 35 to 40 percent of the 250 victims in New Castle County were child victims of intrafamily sexual abuse. In other words, it occurred within the family.

Ms. BALDWIN. Yes, Senator. That would be a parent or a person in a caretaker role, a live-in boyfriend or paramour, yes, grandparent, foster parent.

Senator ROTH. I would suspect that must be the most difficult kind of case to uncover?

Ms. BALDWIN. A lot of the children are disclosing to friends, neighbors, schoolteachers, and that is usually the way that is reported.

Senator ROTH. A second point you make, but I think it warrants repeating, is your statement that "I have never worked on a case where child pornography occurred in isolation." In other words, you do agree that there is a direct link between child pornography and child abuse?

Ms. BALDWIN. Based on my professional experience, most definitely, Senator.

Senator ROTH. Ms. Baldwin, how old are the children involved in these cases? What is the range?

Ms. BALDWIN. Right now we have a 5-month-old. We have had younger.

Senator ROTH. Five months old.

Ms. BALDWIN. Yes.

Senator ROTH. Subject to sexual abuse?

Ms. BALDWIN. Yes, yes.

Senator ROTH. Unbelievable. Do you know of any incidents where boys were transported across State lines for the purpose of sexual abuse?

Ms. BALDWIN. Yes, Senator. We had a case a few years ago where a 54-year-old upstanding member of the community was sexually involved with children, and he transported four boys that we know of, ages 9 through 11, across the Delaware State line into Pennsylvania up to the Poconos where he sexually abused them, and this occurred on more than one occasion.

Senator ROTH. So you would agree that the Mann Act ought to apply across-the-board to both sexes?

Ms. BALDWIN. Yes, it should. Yes.

Senator ROTH. Do you find there to be adequate cooperation between law enforcement facilities? Does that come within your purview? Do you find adequate supports, say, between the Federal and State authorities?

Ms. BALDWIN. On the cases that we have had jointly, yes. There has been a great deal of cooperation and interaction.

Senator ROTH. Ms. Baldwin, I appreciate very much your being here today. I find your testimony most helpful, and I appreciate your taking the time. Thank you very much.

Ms. BALDWIN. Thank you, Senator.

[Prepared statement follows:]

Prepared Statement of Susan Baldwin

My name is Susan Baldwin and I am the Director of the Victim/Witness Assistance Program in the State of Delaware Attorney General's Office. I am here today to talk with you about my experience and how it relates to the need for enactment of S. 2398.

I am a social worker by training and was employed by the Attorney General's Office in 1979 as their first social worker. For five years I was assigned to the prosecutorial unit known as the Rape Response Unit. In 1983 I was appointed to my present position and currently supervise the four components of our statewide Program including the Notification Unit, the Rape Response Unit social workers, Services Unit and Project Repay. I also handle a full caseload of 90-100 victim cases per quarter. Although initially I worked exclusively with sexual offense victims, my present caseload also includes victims of family violence, child physical abuse, property crime victims and families of homicide victims.

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I have seen the pain of sexual abuse and child pornography on the faces of Kathy, Winnie, Charlie, Debbie, Kevin, Larry, Denise, Keith, Marie, Joelle, and many others. I have observed their conflicts, their torment, guilt, shame, sense of betrayal, their misguided loyalties and anguish. I have been hugged by some of these victims and hated by others. I have literally felt their tears.

We cannot depend on young children to protect themselves from sexual abuse and exploitation through pornography. Children must depend on responsible adults for help. They depend on you, the lawmakers, to enact statutes that provide protection and fill the loopholes in existing legislation. S. 2398 will prohibit the advertising of child pornography and will gender neutralize existing legislation to afford equal protection to male victims.

I am pleased to be able to appear today and share my experiences with you and endorse the proposed legislation. I would be happy to respond to any questions you may have.

Senator ROTH. Our last witness today is Barry Lynn, the legislative counsel for the American Civil Liberties Union. Mr. Lynn, I believe you have devoted much of your time to the issue of child pornography. As I told the others, if you can summarize your statement, your full statement will be included as if read. We welcome your comments today.

STATEMENT OF BARRY W. LYNN, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Mr. LYNN. Thank you very much, Mr. Chairman. As a predicate to discussion of S. 2398, I would like to clarify just for a moment the American Civil Liberties Union's often misinterpreted stance on the issue of child pornography. We did file a brief in the *New York* v. *Ferber* case arguing that the distribution of child pornography was protected under the first amendment.

But in our view, the criminal laws should proceed, and in fact, proceed with increased vigor against those who commit the underlying conduct which results in the production of sexually explicit photographs of children. There is much that can be done under existing law, and which could also be enhanced by new Federal and State law initiatives to reach and to hold culpable those who procure children for the production of child pornography, those who actually engage in sexual activities with children of which photographic records are made, those who knowingly finance such productions, as well as other willful participants who aid and abet the act of child molestation.

In addition, the pictures are themselves often usable as evidence of these underlying crimes. It is the sexual abuse of children, clearly a violation of the rights of children, which is the ultimate damage to be prevented.

When one criminalizes the transfer of already created child pornography, it is a sad example of law enforcement too little too late. The legislation under consideration today has two principal components, sections on the advertising of child pornography and prostitution and sections on the interstate transportation of persons for sexual purposes. I would like to address them in order.

Section 2(c) would amend the Child Protection Act to proscribe advertisements for any visual depictions involving the use of a minor engaging in sexually explicit conduct, or which offer participation in any act of sexually explicit conduct with any minor.

A successful prosecution under section 2(c)(1) would be possible only after demonstrating that the advertised material is actually proscribed child pornography. For example, you may know that there are frequently photo set advertisements in the back of adult magazines which are illustrated with a picture of a woman in pigtails. The presence in the advertisement of this so-called pseudo-child imagery cannot be legally sufficient to presume the advertised product, in fact, involves a woman under the age of 18. So in order to prove that it is child pornography, the material must actually be obtained by law enforcement personnel.

Once they receive it, normally through the mail, the element of transportation, shipment, or distribution currently prohibited in existing law has generally already occurred. Therefore, much of this provision seems to have a largely duplicative practical function.

Moreover, the provision could actually be counterproductive for locating child abusers in order to prosecute them for the underlying crimes of sexual abuse. Without placing our imprimatur on what may constitute entrapment in some cases we note that law enforcement officials responses to advertisements remain a significant source of leads for prosecutions.

Were this bill to have the effect of terminating such advertisements completely, this source of investigative information would also dry up.

There are several other necessary clarifications in section 2. First, it is unclear what constitutes "reason to know" that an advertisement, in fact, offers prohibited materials or participation in proscribed activities. The danger of a failure to clarify this language is illustrated, I believe, by the recent final report of the Attorney General's Commission on Pornography which endorsed the concept of criminal prosecution of such advertisements. The report discussed the issue of coded advertisements, illustrating it with one such notice which read "Family man seeks others with similar interests."

But I ask is a publisher of classified advertisements held under this bill to be able to decode every phrase invented by child abusers to discuss their interests? Linking a publisher or printer's criminal liability to putative knowledge of coded messages creates serious vagueness problems with this section. We would recommend that the "reason to know" language be deleted.

Second, section 2(c)(2) would seem to prohibit an advertisement which, for example, concerns soliciting sexual activity with someone 17 even if it were lawful in both the State where the 17-year-old lived, and the State the solicitor lived, for these parties to

engage in sexual activity. Such a change in Federal law, seeking in an indirect fashion, to proscribe sexual activity which a State has not chosen to make a criminal matter does raise a serious federalism issue.

In a less controversial area, it would be akin to having Congress prohibiting the advertising of radar detectors which are legal in some States, illegal in others. We would suggest narrowing the solicitation section and language so that it would cover only clearly unlawful sexual activity. In a broader sense, this whole section, or several sections, which move toward additional restriction on advertising of this material, in our view, moves the public in the wrong direction, not closer to preventing actual child abuse, but one step farther away from the actual abuse itself.

Finally, on the issue of gender neutrality, sections 3 and 4 of this bill seek to make various Federal statutes, including the Mann Act gender neutral by replacing language such as "woman" or "girl" with the word "individual." This proposal is valid insofar as it seeks to accord equal protection of the law to both sexes. It is unwise, however, insofar as it merely makes gender neutral a statute which is quite archaic and in need of a general overhaul.

The current statute makes it an offense to knowingly transport females interstate for the purpose of prostitution, debauchery, or other immoral practice. The legislative history of this act makes it clear, however, that it reflects what the Supreme Court said is the supposition that the women with whom it sought to deal often had no independent will of their own, and embodies, in effect, the view that they must be protected from themselves.

The current act, therefore, does not merely proscribe nonconsensual transportation for forced prostitution or sexual assault. It has been held to cover transportation for entirely consensual sexual conduct, as well. Even the Attorney General's Pornography Commission recommended coupling gender neutrality with a substitution of "unlawful" for the word "immoral" activities. We would recommend that, and going one step beyond to make consent of the transported party a defense to the violation, so that the core of the offense was clearly and absolutely its nonconsensual nature.

A Federal statute which can in any way be read to make it a crime for a boyfriend and a girlfriend to cross a State line and engage in sexual activity is simply too broad to be routinely extended. And that, we feel, is the problem with section 4 of the bill as well.

On the whole, this proposal is an effort, and a serious one, to deal with some very significant abuses of the rights of children to be free of coerced sexual activity. In our view, however, it does need to be narrowly defined, considerably narrowed in its language to avoid significant new constitutional problems. Thank you.

[Prepared statement follows:]

Prepared Statement of Barry W. Lynn

Thank you for the opportunity to testify regarding S.2398, a bill to ban advertisements for child pornography and to further regulate interstate transportation of individuals for sexual activities. The American Civil Liberties Union is a national non-partisan organization of 250,000 persons dedicated to defense of the principles embodied in the Bill of Rights. For over sixty years the ACLU has sought to preserve and strengthen the First Amendment as a bulwark against all forms of government censorship.

The ACLU Position Regarding Child Pornography

As a predicate to discussion of S.2398, I wanted to clarify the ACLU's often misinterpreted stance on child pornography. The ACLU did file an amicus brief in New York v. Ferber 458 U.S. 747 (1982) arguing that the distribution of child pornography was protected under the First Amendment. In our view, the criminal law should proceed, in fact proceed with increased vigor, against those who commit the underlying conduct which results in the production of sexually explicit photographs of children. There is much which can be done under existing law (which could also be enhanced by new federal and state legislation) to reach and hold liable those who procure children for the production of child pornography, those who actually engage in sexual activities with children of which photographic records are made, those who knowingly finance such productions, as well as other willful participants who aid and abet the act of molestation. In addition, the pictures are, quite frequently, themselves useful as evidence of these underlying crimes. It is the sexual abuse of children, a violation of the rights of children, which is the ultimate damage to be prevented. When one criminalizes the transfer of already created child pornography, it is a sad example of law enforcement "too little, too late".

S.2398 and Advertisements for Child Pornography

Section 2(c) would amend 18 U.S.C. Sec. 2251 to proscribe the activity of anyone who "makes, prints, or publishes, or

causes to be made, printed, or published, any notice, statement, or advertisement (1) to receive, exchange, buy, produce, display, disseminate, photograph . . . any visual depictions involving the use of a minor engaging in sexually explicit conduct; or (2) offering participation in any act of sexually explicit conduct with any minor" if the person "knows or has reason to know" that the advertisement "is for material which in fact depicts sexually explicit conduct . . . or offers participation in any act of sexually explicit conduct . . ." and is or will be transported or mailed in interstate or foreign commerce.

A successful prosecution under Sec. 2 (c) (1) would be possible only after demonstrating that the "advertised" material is actually proscribed "child pornography". For example, there are frequently photo set advertisements in "adult" magazines which are illustrated with a picture of a woman in pigtails. The presence in the advertisement of this so-called "pseudo-child" imagery cannot be legally sufficient to presume the advertised product in fact involves a woman under the age of 18. In order to prove that it is child pornography, the material must actually be obtained by law enforcement personnel. Once they receive it, normally through the mail, the element of "transportation", "shipment", or "distribution" currently prohibited in 18 U.S.C. Sec. 2252 (a) has occurred. Therefore, this provision seems to have a largely duplicative practical function.

Moreover, the provision could actually be counterproductive for locating child abusers in order to prosecute them for underlying crimes of sexual abuse. Without placing our imprimatur on what may constitute entrapment in some cases, we note that law enforcement officials' responses to "advertisements" remain a significant source of leads for prosecutions. Were S.2398 to have the effect of terminating such "advertisements" completely, this source of information would also dry up.

There are several other necessary classifications in Section 2. First, it is unclear what constitutes "reason to know" that an advertisement "in fact" offers prohibited materials or

participation in proscribed activities. The danger of a failure to clarify this language is illustrated by the recent Final Report of the Attorney General's Commission on Pornography, which endorsed the concept of criminal prosecution for such advertisements. The Report discussed the issue of "coded" advertisements, illustrating it with one such notice reading "Family man seeks others with similar interests". Is a publisher of, say, classified advertisements supposed to be able to decode every phrase invented by child abusers to discuss their interests? Linking a publisher or a printer's criminal liability to putative knowledge of coded messages creates serious "vagueness" problems with the section. The "reason to know" language should be deleted.

Second, Sec. 2 (c) (2) would seem to prohibit an advertisement soliciting sexual activity with someone 17 even if it were lawful in both the state where the 17 year old lived and the state the "solicitor" lived for these parties to engage in sexual activity. Such a change in federal law, seeking in this indirect fashion to proscribe sexual activity which a state has chosen not to make a criminal matter, raises a serious federalism question. The "offering participation in any act" language should at least be limited to offering for "unlawful" sexual activity. Narrowly drawn solicitation statutes might withstand constitutional scrutiny; this one would not.

S.2398 and Gender Neutrality in the Mann Act

Section 3 of S.2398 seeks to make 18 U.S.C. Sec. 2421, the so-called "Mann Act" gender neutral by replacing language such as "woman or girl" with the word "individual". This proposal is valid insofar as it seeks to accord equal protection of the law to both sexes; it is unwise insofar as it merely makes gender-neutral an archaic statute in need of general overhaul.

The current statute makes it an offense to knowingly transport females interstate for the purpose of "prostitution or debauchery, or for any other immoral purpose, or with intent or purpose to induce, entice, or compel such woman or girl to become a prostitute, or to give herself up to debauchery or to

engage in any other immoral practice [emphasis added]". The legislative history of this act makes it clear that it was designed "to protect women who were weak from men who were bad". The Supreme Court characterized this as reflecting "the supposition that the women with whom it sought to deal often had no independent will of their own, and embodies, in effect, the view that they must be protected from themselves". Wyatt v. United States U.S. 525 (1960). The current act, therefore, does not merely proscribe non-consensual transportation for "forced prostitution" or sexual assault; it has been held to cover consensual sexual conduct as well. See e.g. U.S. v. Pelton 578 F.2d 701 (8th Cir., 1978); cert. denied 426 U.S. 905; Hattaway v. United States 399 F.2d 431 (5th Cir.,1968)

Even the Attorney General's Pornography Commission recommended coupling gender neutrality with a substitution of "unlawful" for "immoral" activities. We would recommend going beyond this recommendation and making consent of the transported party a defense to the violation, so that the gravamen of the offense was clearly its non-consensual quality. A federal statute which can be read to make it a crime for a boyfriend and girlfriend to cross a state line and engage in sexual activity is simply too broad to be routinely extended.

Section 4 of S.2398 seeks to make gender-neutral 18 U.S.C. Sec. 2422, currently affecting "whoever knowingly persuades, induces, entices, or coerces any woman or girl to go from one place to another in interstate or foreign commerce . . . for the purpose of prostitution or debauchery, or for any other immoral purpose . . ." Our objections to this are parallel to those discussed in regard to section 3. Sec.2422 also criminalizes even consensual conduct.

Conclusion

S.2398 is an effort to deal with some serious abuses of the rights of children to be free of coerced sexual activity. In our view, however, it needs to be narrowed considerably to avoid significant constitutional problems.

Senator ROTH. Thank you, Mr. Lynn. We appreciate your being here today. We are pleased to have Senator Simon.

OPENING STATEMENT OF HON. PAUL SIMON, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator SIMON. Let me, if I may, just make a few comments to Mr. Lynn.

Senator ROTH. Please proceed.

Senator SIMON. I have to believe we can deal with these problems and yet be sensitive to basic civil liberties. Your testimony hints at what you would like to see in a bill. But if you could give us some specifics, that would be helpful.

Mr. LYNN. I certainly will be happy to give you specific language in regard to this. I think the most important issues to resolve are the "reason to know" standard so that we make sure that publishers are not liable for the unintended publication in their newspaper or magazine of something that turns out to be an ad for prohibited activity.

And also to realize the need to make the Mann Act suitable for and used for nonconsensual transportation of both boys and girls, and to be serious about that. There is a great deal that we agree can and should be done, and more that should be done, in the area of preventing child abuse.

I think that is something we can all agree about and can work with this bill and others to foster.

Senator SIMON. Thank you. Thank you, Mr. Chairman.

Senator ROTH. Thank you, Senator Simon. Again, we appreciate your being here, Mr. Lynn.

[Whereupon, at 11:05 a.m., the committee was adjourned.]

APPENDIX

STATEMENT OF JACK E. SWAGERTY
ASSISTANT CHIEF POSTAL INSPECTOR
FOR CRIMINAL INVESTIGATIONS
BEFORE THE PERMANENT SUBCOMMITTEE
ON INVESTIGATIONS
SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

AUGUST 11, 1986

MR. CHAIRMAN, I AM JACK E. SWAGERTY, ASSISTANT CHIEF POSTAL INSPECTOR FOR CRIMINAL INVESTIGATIONS. I APPRECIATE THE OPPORTUNITY TO PRESENT THE VIEWS OF THE U.S. POSTAL SERVICE ON S. 2398, THE PROPOSED "CHILD SEXUAL ABUSE AND PORNOGRAPHY ACT OF 1986."

THE POSTAL INSPECTION SERVICE HAS THE RESPONSIBILITY FOR INVESTIGATING AND ENFORCING THOSE LAWS THAT INVOLVE THE MAILS OR THE POSTAL SERVICE. INCLUDED IN THOSE LAWS ARE THE VARIOUS PROHIBITIONS AGAINST THE USE OF THE MAILS TO TRANSMIT CHILD PORNOGRAPHY, OBSCENE MATTER, OR CERTAIN SEXUALLY ORIENTED MATERIAL.

FOR SEVERAL YEARS, ACTING IN ACCORD WITH ENFORCEMENT POLICIES OF THE DEPARTMENT OF JUSTICE, WE HAVE GIVEN HIGH PRIORITY TO INVESTIGATIONS OF PERSONS USING THE MAILS TO DISTRIBUTE CHILD PORNOGRAPHY. WE WELCOME THE ASSISTANCE WHICH S. 2398 WOULD PROVIDE TO THOSE ENFORCEMENT EFFORTS.

WHILE I SHALL LIMIT MY REMARKS TO THAT PORTION OF THE BILL THAT WOULD DIRECTLY AFFECT OUR INVESTIGATIONS, I WOULD LIKE TO COMMEND YOUR EFFORTS TO CURTAIL THIS PARTICULARLY OFFENSIVE ACTIVITY THROUGH A BROAD RANGE OF IMPROVEMENTS IN THE CURRENT STATUTES.

S. 2398 PROPOSES, AMONG OTHER THINGS, TO CLOSE A SERIOUS LOOPHOLE IN EXISTING CHILD PORNOGRAPHY LAWS. CURRENTLY, THE PRODUCTION

AND DISTRIBUTION OF VISUAL DEPICTIONS OF MINORS ENGAGING IN SEXUALLY EXPLICIT CONDUCT IS PROHIBITED BY TITLE 18 OF THE UNITED STATES CODE. HOWEVER, THE PRODUCTION AND PUBLICATION OF ADVERTISEMENTS FOR CHILD PORNOGRAPHY ARE NOT. S. 2398 WOULD CORRECT THIS SITUATION BY MAKING SUCH ADVERTISEMENTS, AS WELL AS SOLICITATIONS FOR CHILD PORNOGRAPHY OR FOR SEX WITH MINORS, ILLEGAL WHERE SUCH ADS OR SOLICITATIONS WOULD BE, OR ACTUALLY HAD BEEN, TRANSPORTED IN INTERSTATE OR FOREIGN COMMERCE OR MAILED. S. 2398 TRACKS THE CHILD PROTECTION ACT OF 1984 (18 U.S.C. §§2251 ET SEQ.) AND RESTRICTS VIOLATIONS TO ADVERTISING FROM PERSONS WHO IN FACT HAVE VISUAL DEPICTIONS OF MINORS ENGAGED IN SEXUALLY EXPLICIT CONDUCT AS DEFINED IN THE ACT. VIOLATIONS WOULD BE PUNISHABLE BY IMPRISONMENT, FINE OR BOTH.

AS A TECHNICAL MATTER, SECTIONS 2251(a) AND (b) AND SECTION 2252(a) OF TITLE 18 CURRENTLY REFER TO "VISUAL DEPICTIONS" WHILE PROPOSED SECTION 2251(c)(2)(A) IS NOT QUALIFIED BY THE WORD "VISUAL." THE COMMITTEE MAY WISH TO PRECLUDE POSSIBLE AMBIGUITY BY INSERTING THE WORD "VISUALLY" BEFORE THE WORD "DEPICTS" IN LINE 21 ON PAGE 2 OF THE PRINTED BILL.

WE WOULD ALSO LIKE TO CALL TO THE COMMITTEE'S ATTENTION THE FACT THAT A METHOD OFTEN USED BY LAW ENFORCEMENT AGENCIES TO IDENTIFY PERSONS WHO TRAFFIC IN CHILD PORNOGRAPHY INVOLVES THE PLACEMENT OF "STING-TYPE" ADVERTISEMENTS. WE SUGGEST THAT LANGUAGE BE ADDED TO THE LEGISLATIVE HISTORY TO CLARIFY THAT SECTION 2 IS NOT INTENDED TO PROHIBIT THE PUBLICATION OF ADVERTISING BY, OR ON BEHALF OF, LAW ENFORCEMENT AGENCIES ENGAGED IN INVESTIGATING CRIMINAL ACTIVITY. WE UNDERSTAND THAT THIS TECHNIQUE IS IN ACCORD WITH INVESTIGATIVE POLICIES OF THE DEPARTMENT OF JUSTICE.

FINALLY, WE WISH TO SUGGEST TO THE COMMITTEE A FURTHER MEANS OF MAKING THE CHILD PROTECTION ACT MORE EFFECTIVE.
WHEN THE 98TH CONGRESS ENACTED THE CHILD PROTECTION ACT, THE

POSTAL SERVICE - A LEADING AGENCY IN INVESTIGATING VIOLATIONS OF THE STATUTES AMENDED BY THE ACT - INADVERTENTLY WAS NOT INCLUDED AMONG ENFORCEMENT AGENCIES HAVING CIVIL ADMINISTRATIVE AUTHORITY TO FORFEIT PROPERTY USED TO VIOLATE THE STATUTE AND PROFITS FROM VIOLATIONS. NOR WERE WE GIVEN CLEAR AUTHORITY TO REQUEST THE JUSTICE DEPARTMENT TO INITIATE CIVIL JUDICIAL PROCEEDINGS AGAINST SUCH PROPERTY. THE AUTHORITY TO CONDUCT SEIZURES AND FORFEITURES, AND THEREBY REMOVE THE PROFITS FROM CHILD PORNOGRAPHY AND DIVERT THEM TO LAW ENFORCEMENT EFFORTS, IS A MAJOR FEATURE OF THE CHILD PROTECTION ACT. THE EFFECT OF OUR EFFORTS IN THIS AREA WOULD BE STRENGTHENED SIGNIFICANTLY IF WE WERE AUTHORIZED TO APPLY THE FULL RANGE OF SANCTIONS ALREADY PROVIDED BY THE CONGRESS IN THE BASIC ACT. OF THE THREE AGENCIES RESPONSIBLE FOR ENFORCEMENT OF THE ACT, ONLY THE POSTAL SERVICE LACKS AUTHORITY TO GIVE FULL EFFECT TO THE SEIZURE AND FORFEITURE PROVISIONS.

SHOULD THE COMMITTEE WISH TO PURSUE THE POSSIBILITY OF AMENDING S. 2398 TO ENABLE THE POSTAL SERVICE TO TAKE MORE EFFECTIVE ACTION AGAINST VIOLATORS OF THE STATUTE, WE WOULD BE PLEASED TO WORK WITH YOUR STAFF IN DRAFTING AN APPROPRIATE AMENDMENT.

MR. CHAIRMAN, I WISH TO AGAIN THANK YOU FOR THE OPPORTUNITY TO PRESENT THE POSTAL SERVICE POSITION CONCERNING S. 2398.

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